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CURRENT TOPICS.

Our readers will pardon us for referring once more to the matter of gowns, which may seem local, concerning the State of New York alone, as our brother of the *Albany Law Journal* would have us understand it is; but the very arguments which apply to the judges of the New York Court of Appeals, are equally applicable to the judges of every court of ultimate resort in the land, for we have constantly refused to recognize in the judges of that court any special ability demanding special veneration. It is a sad confession of weakness, when our brother resorts to such argument as he has indulged in, in reply to our criticism in a recent number. He asks us if it has ever occurred to us that their judges and their bar are better fitted to pronounce upon the question in their own State. That is not argument; and it is a very bare proposition that can find no argument to support it. This gives us the impression that our Albany brother is being "forced to the wall," and for want of argument resorts to this reminder. Why did our Albany brother take pains to reply to the objections of our Denver cotemporary, if it did not concern it? Why did he not then throw out this quiet intimation to attend to our own affairs, and to refrain from interference in those beyond our concern? That thought did not suggest itself until he discovered that a triple attack was made from Denver, Chicago and St. Louis; it comes now with bad grace. But this is only another exhibition of that narrow-mindedness and impatience, that firm belief in his own infallibility, and abuse of those who assume the courage to dissent from his conclusions, which has been a distinctive trait of our Albany brother, and we cordially advise him to treat his opponents with more respect. It creates a decidedly unfavorable impression either of the mental calibre of the advocate, or of the lack of merit in the proposition he advances, when he turns upon his opponent and reminds him in vulgar tones, that "it is none of his business." Such is substantially what our brother desires to impress upon our minds; but we consider the proposition as a matter coming entirely within our scope, and propose to discuss it as fully as we desire.

Our brother is decidedly inconsistent. With one hand he offers the bar a proposition for a revolution in the law, *i. e.* codification, and with the other he asks the bar to make a retrograde movement, and to place the judges in gowns, which have been cast aside for years, if ever worn, and thus ape the practice that is still preserved in England, as a relic of the past, only by the conservative spirit which pervades its people, and particularly its bar. Our brother kindly informs us thut he has made a trip to Washington, (for which information we are very grateful) and describes his pleasure at witnessing the glorious sight which the gowns of the Supreme Court Justices present; and then demands what reason exists why the Court of Appeals judges should not have them as well as they. There is a great distinction, brother. You demand that the past shall be recalled; that a custom which fell into disfavor years ago, shall be shall be shown the veneration it once received; that these garments which have lain buried in deserved oblivion for years shall be resurrected; and you must produce clear and conclusive reasons why, in these days of progress and reform, we shall go backward. It is not for us to bear the burden of attacking your proposal; you must satisfy us that the public good demands this movement, or you have failed (to employ language familiar to us both) to make out a *prima facie* case. You can not call upon us for the arguments against it; the burden lays upon you to furnish us with those which may be urged in favor of its adoption. As yet, you have carried on but a negative campaign; and a success derived from such efforts is poorly earned. We claim that the proposition is unrepublican in its character and its tendencies. Judges are but men appointed or elected to attain a particular end. They are but public servants, chosen only for the interests of the people; we can recognize in them nothing which would place them above the level of the people from whom they come. When our brother

asks us whether we would think less of the Michigan judges, if they were in gowns, we answer that we certainly should hold them in no higher esteem. If the judges themselves made the proposition to put on robes, we unhesitatingly declare that we should lose some confidence in them, for it would indicate a feeling of contempt for the people, as their inferiors. The custom of wearing gowns and wigs had its birth when the bench was surveyed with veneration, and the bar with fear. But these feelings have disappeared. No longer are the bench or bar regarded with those feelings. We must govern ourselves by the state of public opinion at the present day.

We regret to learn that we have occasioned any disturbance of the peace of our brother by the remarks which we recently employed in our allusions to him. He seems to labor under the impression that we worked ourselves into a great rage over his slur upon our Western courts and that our atmosphere would be decidedly uncomfortable for him, should he be so bold, at this stage of hostilities, to intrude upon us. After resenting our reference to him, as making an effort to appear "grotesquely humerous" and assuring us that we have become needlessly "excited" he expresses the hope that "our brother does not carry any weapon more deadly than a 'pocket pistol,' else this temper of his may prove dangerous to his near neighbors." It is possible that our brother contemplated a visit to our city, after enjoying such a pleasant trip to the capital, and is deterred through fear of our concealed weapons. We assure our brother that neither our "temper" nor our "weapons" have given us the slightest trouble since our arrival in this city. We call such implements of destruction into requisition only when other means of persuasion and argument become unequal to the task of repelling the attacks of our opponents, and we have the most implicit confidence in our ability to cope with any sally coming from the direction of Albany without the assistance of the former. We promise our brother a warm reception in St. Louis, should he venture out among "our Western communities" without dread of our "weapons" or "temper" or, if he concludes to remain at his post, then we will administer the same treatment through our columns, to any propositions which he may advance, the tendencies of which may seem to us to be harmful. We regret to learn that we have been the cause of any uneasiness to our brother, and we assure him that we have not put on any "war-paint" nor have we given the slightest consideration to any proposition to make a trip to Albany with hostile intentions. If we have occasioned any loss of appetite, or attack of dyspepsia, we will most cheerfully make amends, and will therefore honor any draft upon us for the amount of his physician's bill.

In an interesting little pamphlet, Sir John Mellor favors the abolition of the oath. He assures us that he has become "profoundly convinced by a long judicial experience of the generous worthlessness of oaths, especially in cases in which their falsity can not be tested by cross-examination, or be criminally punished," and has consequently "become an advocate for the abolition of oaths as the test of truth," and, he adds: "An honest man's testimony will not be made more true under the sanction of an oath, and a dishonest man will only be affected by the dread of temporal punishment." This declaration exactly reflects the opinion to which we have always adhered. We have never been able to perceive what strength the administration of an oath adds to the credibility of the witness. Its sanctity can have no influence upon the mind of an irreligious man, for to his mind nothing is sacred; neither can it affect him who has a religious turn of mind, for to him everything seems sacred. To him who stands upon the brink, with one eye towards unbelief and the other in the direction of piety, there is no code, except that of integrity, honor and good will to everybody, which can direct his actions; and no formal assent to a few obsolete phrases can attach any greater weight to his assertions. Year by year the old institutions have been crumbling, and, in our judgment, not many years will pass away ere the oath dies with them.

FEDERAL ARRESTS OF STATE PRISONERS.

On a recent occasion,[1] we, with some reluctance, dissented from Judge Krekel's conclusions in the Frank James case, as to the right of the Federal authorities to arrest a prisoner under bail, for the violation of State laws, but upon a more thorough investigation, and a more deliberate consideration of the question, our convictions have become stronger, that that learned judge took an incorrect view of the matter. It is a question which reaches way down to the roots of the doctrine of State Rights, and its importance demands its early settlement by some tribunal more authoritative than a district court. It is high time at this late day, to know whether there is any line between Federal or State laws, and whether the welfare of the nation, as promoted by the enforcement of its laws, is of higher importance than that of single States.

The great contention of Judge Krekel is that the jurisdiction of both courts is co-ordinate; and that therefore, the court which first obtains jurisdiction, holds it to the exclusion of the other. It is true that it was once said by Judge Dillon[2] that, "if a person is in actual custody of the United States for a violation of its laws, no state can by *habeas corpus* or any other process take such person from the custody of the Federal tribunal or officer. So, on the other hand, a person in custody under the process or authority of a State is by express enactment beyond the reach of the Federal courts or judges." But this was a mere *dictum*, wholly gratuitous and worthy of attention only as coming from the lips of an able judge. So it has often been said and held, that the Federal courts can not by process oust the State officers of their control over property levied upon by them, it being in the custody of the law.[3] Thus where the Supreme Court of Pennsylvania attached a vessel on mesne process and by libel filed in the United State District court for mariner's wages, the possession of the sheriff was sought to be wrested from him, the Federal Supreme Court refused to recognize any doctrine which would make the jurisdiction of the two courts anything more than concurrent; and accordingly held that the State court having first obtained, it was entitled to retain it to the exclusion of the other.[4] There is no debt, according to the court, which the Federal courts have the exclusive inherent power to enforce. The civil jurisdiction of the Federal courts depends upon the citizenship of the parties, not upon the subject matter of the suit. A debt sued for in a State court is as important as one which is sought to be recovered by federal process, and the incidental powers of attachment are of the same degree. Even this was refuted by Taney, C.J., speaking for himself and three other dissenting judges. The admiralty jurisdiction of the Federal courts, according to him, was established by the Constitution, and a common law court of a State has no right to impede the admiralty in the exercise of its legitimate and exclusive powers. The Federal Constitution was as much a part of the law of Pennsylvania as its own Constitution; and the laws enacted by the general government pursuant to the Constitution are obligatory upon the courts of the States.

These cases have been cited and approved as supporting Judge Krekel's decision. But there is no analogy. They were civil cases, and the decisions were based upon the broad ground that when a State court obtains jurisdiction over property, it can not be defeated by a Federal court. But when the violation of a law enacted by the highest legislative assembly of the nation in pursuance of the exclusive powers granted it by the Constitution, occurs, a very different question is presented. Each State, by solemn compact with the nation, stipulated that the Constitution and all legislation thereunder should be the supreme law of the land. All State rights inconsistent with the assertion of that supremacy were thereby surrendered. As to these matters the general welfare of the nation was of supreme interest; no ends of individual States were of equal importance. The very object of the Union was to give everything of general importance prominence on the face of the Constitution under the name of "delegated powers." The power of a sovereignty is commensurate with its majesty. When the

[1] 18 Cent. L. J. 51.
[2] United States v. Van Fossen, 1 Dillon 406.
[3] Hogan v. Lucas, 10 Pet. 400.
[4] Taylor v. Carryl, 20 How. 583.

several States provided that the Nation should be supreme, they surrendered all claim to equal majesty. This is a goverment of laws. The Federal government was established to enforce those laws which all the States conceded should be supreme. By that compact, they impliedly agreed that no act of theirs or their officers should be an obstacle to the vindication of that supremacy, and to securing the speedy punishment of all who should dare to insult its majesty by defying its laws. As the importance of laws is derived solely from the dangerous consequences of their infringement, it was acknowledged that the violation of the Federal laws was fraught with greater dangers than the infringement of the State's laws. To punish the offender, his person must be obtained, and it is one of the incidents of the stipulated supremacy, that the State should surrender its custody to the Federal government. According to Judge Krekel's argument, the State is made to say: "We admit that your laws are supreme; we concede that it was part of our stipulation that the violation of your laws should be deemed more dangerous than that of ours. But, yet, if we are prejudiced against your laws, we have the right to collude with our citizens, place them under bail, and encourage them to violate your laws, and dare you to take them. It is true that we stipulated that the enforcement of your laws should be of paramount importance, but we propose to defeat our arrangement, by retaining our prisoner. You claim that this man has committed treason; but he is under bail to us, to answer for the commission of the crime of simple assault in this State, and the nation must bide its time until we feel inclined to press our charge."

It has been said that "when bail is given, the principal is regarded as delivered to the custody of his sureties. Their dominion is a continuance of the original imprisonment. Whenever they choose to do so, they may seize him and deliver him up in their discharge, and if that cannot be done at once, they may imprison him until it can be done. They may exercise their rights in person or by agent. They may pursue him into another state; they may arrest him on the Sabbath, and if necessary, may break and enter his house for that purpose. The seizure is not made by virtue of new process; none is needed. It is likened to the re-arrest by the sheriff of an escaping prisoner."[5] "The bail have their principal on a string and may pull the string whenever they please and render him in their discharge."[6] But with this we cannot agree. A prisoner is often allowed to go at large on his own recognizance. Does any one contend that he is then in his own custody; that he is his own jailor; that the jailor's custody is only extended? Then why should the mere fact that one or two of his friends have joined him in his recognizance change the nature of his liberty? Their right to seize and surrender him is based upon their having from motives of mere generosity procured him his liberty and upon their privilege to repent of their act and return him to those from whose custody they took him. He has no ground for complaint for they have merely undone what they have done. There is no continuance of custody. The right of liberty is inherent. By the commission of crime, one temporarily surrenders that right. The government deprives him of it to ensure his presence at the trial for his crime. If he offers bail, he is restored to his liberty. The idea that the imprisonment is transferred to his sponsors seems to us untenable. They come forward to enable him to regain his liberty, not to purchase it for themselves. By his release he is free from all imprisonment, actual or theoritical. Then no conflict has arisen. The Federal authorities have found a transgressor of their laws at large and seized him.

Is the arrest by the Federal authorities a good defence? In Taintor v. Taintor,[7] brought originally in Connecticut, but afterwards carried to the United States Supreme Court[8] the principal in a recognizance executed in Connecticut was arrested in New York on a requistion upon the governor of the latter State from the governor of Maine, and, upon his removal to the last State was convicted and sentenced to her penitentiary, by reason of all which the breach of the bond occurred. The bondsmen claimed that the requisition being prescribed by the Federal Constitution, the arrest in New York was made thereunder. But the court denied that

[5] Per Swayne, J. in Taintor v. Taylor, 16 Wall, 369, 371.
[6] 6 Modern, 231 Cas. 339 Anon.
[7] 36 Conn. 242, 252.
[8] 16 Wall. 366.

there was any exercise of Federal authority; that while extradition was sanctioned by the constitution, these was no compulsion and that the provision was but a mere recognition of the duty the States owed each other to enable each to vindicate its wrongs. The arrest was in no sense a Federal arrest.[9] From the judgment of the majority, Justices Field, Clifford and Miller dissented. In their opinion, the principal had been arrested under the laws of the United States and the act of a Supreme power had relieved the sureties of their burden. "It seems to me" says Field, J. "that whenever sureties on a recognizance are rendered unable to surrender their principal, because he has been taken from their custody without their assent, in the regular execution of a law or treaty of the United States, their inability thus created should constitute for their default a good and sufficient excuse. The execution of the laws and treaties of the United States should never be allowed in the courts of the United States, to work oppression to any one."

From the two opinions no other conclusion is deducible it seems to us, but that contrary to the decisions of Judge Krekel. The majority maintained that the arrest was not one under the Federal laws, and therefore not the act of a Supreme power, which would undoubtedly release the bondsmen. The minority took the contrary view, so that there was no dispute as to the effect of an arrest under the Federal laws, but the whole question hinged upon whether there had been such an arrest at all. Far then from supporting Judge Krekel's decision, it is essentially opposed to it.

In Arkansas[10] the arrest by the Federal authorities was held to discharge the recognizance to the State. In New Hampshire, where the principal was arrested by the Federal Court, but escaped, this was held no excuse, but it was assumed that if he had not escaped, the bondsmen would have been discharged.[11] In Kentuchy, the question arose in Commonwealth v. Overby,[12] and the bondsmen were held to be discharged. But in this case, the arrest by the Federal authorities was for the same offence for which the State arrest was made, and the State was consequently not damaged by the default. It has been held that where the principal enlisted in the Union army and was prevented from returning, the bondsmen were relieved;[13] *a fortiori* if he was impressed into the military service in consequence of which he was unable to appear.[14] But the former of these propositions has been denied.[15] "To admit," said Parker C. J. "that a principal may, by a voluntary assumption of a duty defeat his undertaking or enable his sureties to do it without the consent of the obligee would be to violate the common principles of justice as well as the faith of engagements."[16]

But this does not conflict with our opinion in the least. We have expressed ourselves as fully as we desire. We have adopted the opinion of Judge Field concurred in by Judges Miller and Clifford that an arrest of a State Prisoner by the Federal authorities is an excuse for forfeiture and are content with its logic and consequences. In a future paper we will discuss the general defences to bail bonds.

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9 Judge Deady has by the way, lately decided the the contrary. In *re Doo Woon*, U. S. C. C. D. Oreg. Dec. 15, 1883, 18 Cent. L. J. 98; 1 West Coast Rep. 333; So in the United States Circuit Court of California, in Robb's case decided, Jan. 18, 1884.

10 Belding v. State, 25 Ark. 315. See United States v. French, 1 Gall. 1.

11 State v. McAllister, 54 N. H. 156.

12 80 Ky. 208.

13 People v. Chisney, 44 Barb. 118; People v. Cook, 30 How, Pr. 110.

14 Barber v. Irwin, 36 Ga. 25, citing; Tontong v. Hubbard, 3 B. & P. 301; Brewster v. Kitchen, 1 Ld, Ray. 321; French v. Shirley, 1 Doug. 45; Harrington v. Dennis, 13 Mass. 13; Reed v. Hockins. 82 E. C. L. 979; Bayley v. Fettiplace, 7 Mass. 325; Melville v. DeWoolf, 82 E. C. L. 842; McCluskey v. Brock, 34 Ga. 206.

15 Grirgrich v. People, 34 Ill. 449; Huggins v. People, 39 Ill. 241; Sayward v. Conant, 11 Mass. 146; Harrington v. Dennie, 13 Mass. 93. See Hunts Case, Vol. 3 Petersdorff's Abridgment.

16 Harrington v. Dennie, *supra*.

AUTHORITY OF AGENTS TO COLLECT FOR THEIR PRINCIPALS.

A principal is bound by the acts of his agent, within the authority he has actually given him, which includes not only the act which he expressly authorizes, but also such subordinate acts as are proper and usual, in

the ordinary course of business, to effectuate the purpose expressed. Beyond that he is liable for the acts of the agent within the appearance of authority which he permits the agent to assume, or which he holds the agent out to third persons as possessing. Otherwise stated, an agent's authority is not only such as the principal intentionally confers, but also such as he intentionally or negligently causes, or permits either the agent or persons dealing with him, to believe he has conferred, together with such authority as is merely incidental to the main purpose of the agency. The principal is liable for the acts of his agent, which he has intentionally authorized, because the act of the agent is the act of the principal. He is responsible for the acts of the agent which he has intentionally caused or allowed either the agent or third persons to believe he has authorized, because to allow him to dispute the authority of the agent in such case, would be to enable him to commit a fraud upon innocent persons. And he is accountable for the acts of the agent, which, by want of ordinary care, he has caused or permitted the agent, or third persons, to believe he has authorized, upon the ground that where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer, and, because, if the agent were the party thus misled, he would thereby be relieved from responsibility upon his implied warranty of authority, and consequently, persons dealing with him as such, would be wholly remediless, unless the principal was bound.

In whatever way the liability of the principal is established, it must flow from his own act. And when established, it can not, on the one hand, be qualified by the secret instructions of the principal,[1] nor on the other hand be enlarged by the unauthorized representations of the agent.[2] These elementary principles are perhaps nowhere questioned,[3] but as is not unfrequently the case with acknowledged rules of law, no little difficulty has been experienced in their application to special states of facts, in confirmation of which we may appeal to the reversals made by courts of review in that class of cases alone which are the subject of this article.

Agents to Take Security.—An agent who is employed to negotiate or conclude a contract, has not, as a matter of course, any incidental authority to receive moneys which may become due under it,[4] and hence a payment of money, due upon a promissory note, made by the maker to a person not in possession of the note, and not authorized by the owner to receive payment, and which was never received by the owner, will not entitle the debtor to a credit for the amount, although the person to whom the payment was made had been employed by the owner as his agent to take the note.[5] Had the owner entrusted the agent with the possession of the written security, or done any other act from which the debtor had the right to believe and did in fact believe that the agent had been trusted to receive payment, payment to him according to the terms of the instrument would have been valid,[6] because if the owner did not intend that the agent should receive payment, he was negligent in leaving the security in the agent's possession, thereby enabling him to impose upon the debtor. And so the fact that the owner has taken the security out of the agent's hands, is considered to be sufficient notice that the agent is not authorized to re-

[1] T Sci. & Art. Association v. State, 58 Ala. 54; Ætna Ins. Co. v. Maguire, 51 Ill. 342; P. & A. Life Ins. Co. v. Young, 58 Id. 476; Hartford Fire Ins. Co. v. Farrish, 73 Id. 166; Woodb. S. Bank v. Charter Oak Ins. Co., 31 Conn. 529, 13 Wall. 222.

[2] Galbreath v. Cole, 61 Ala. 139. In Farmers' and Mechanics' Bank v. Butchers' and Drovers' Bank, 16 N. Y. 125, it was held that an agent could bind his principal by an unauthorized representation relating to the extent of his authority, but to an extrinsic fact upon which the exercise of his authority depended and the existence of which persons dealing with him could not by the use of ordinary diligence ascertain.

[3] 1 Parsons on Contracts, 44, 45; 2 Kent Com. 620, 621; Mechanics' Bank v. N. Y. & N. & H. R. R. Co., 3 Kern, 632; Farmers' and Mechanics' Bank v. Butchers' and Drovers' Bank, 16 N. Y. 125; Story on Agency, secs. 74, 90, 91, 127; Dunning v. Roberts, 35 Barb. 463; Thurman v. Wells, 18 Barb. 500; 1 Am. L. Cas. 567; Law v. Stokes, 32 N. J. Law, 249; Sickens v. Irving, 7 C. B. (N. S.) 165, 171, 173; Smith v. McGuire, 3 Hurl. & N. 554; Beaufort v. Neeld, 12 Clark & Fin 290; Barring v. Corrie, 2 Barn & Ald. 137.

[4] Thomson v. Elliot, 73 Ill. 221; Tew v. Labiche 4 La. An. 526; Clark v. Smith, 88 Ill. 298.

[5] Tew v. Labiche, *Supra*; Austin v. Thorpe, 30 Ia. 376; Tappan v. Moreman, 18 Id. 499.

[6] Hutchinson v. Munger, 41 N. Y. 155; Draper v. Rice, 56 Iowa, 114; s. c. 11 Rep. 370; Kenner v. Creditors, 8 La. An. (N. S.) 64; Sumner v. Sanders, 51 Mo. 89; 55 Id. 505, distinguished in Butler v. Donnan, 68 Mo. 298; Torry v. Holmes, 10 Conn. 512; Stewart v. Aberdein, 4 Mees. & W. 211.

ceive payment, and if the debtor notwithstanding makes payment to him, he thereby constitutes him his own agent to pay the owner. The same law prevails in respect to other written securities for the payment of money.[7] An agent to effect insurance, who is permitted to retain the policy in his possession, has authority to collect in case of loss,[8] and the presumption is, that he retains it, especially where he proceeds to collect the money.[9] Authority to receive the principal sum secured by bond and mortgage, is not deducible from express authority to collect the interest,[10] and an agent to whom the payee of a promissory note delivers it unindorsed, with authority to collect the interest thereon and take a new note, with an indorser, for the principal sum, is not authorized to receive the principal in money.[11] But payment to the agent who took the note, and to whom the owner has entrusted it for some other purpose will discharge the debtor.[12]

Miscellaneous Agents.—Authority to sell and convey land includes incidental power to receive payment of so much of the purchase money as may be paid before the execution of the deed.[13] So the receipt of that portion of the purchase money which is to be paid down, is a necessary incident to authority to contract for the sale of land.[14] In England it is said that an agent employed to sell an estate has not as such authority to receive payment.[15]

The bare fact that a person had in his possession a statement of the account due the plaintiff, in the handwriting of their bookkeeper, is not a circumstance from which his authority to collect can be inferred.[16] So an agent employed to keep books and accounts and compute the interest due upon notes, has no implied authority to receive payment of such notes and accounts.[16] But a judgment may be paid to the attorney of the judgment creditor in the cause.[17]

Agents to Sell.—According to Livermore,[18] it has been made "a question with civilians whether an authority to sell or let includes an authority to receive the price or rent. Pothier is of opinion that this power is not generally included, and he founds his argument upon a law of Ulpian that a person appointed to make contracts for freighting a ship, is not empowered to receive the freight. But he says that under circumstances the authority to receive the price will be presumed, as, if the goods are put into the hands of public brokers to be sold, and they are in the habit of receiving the price, the putting the goods in their hands imports an authority for them to receive payment from the purchaser." These questions have likewise been much discussed in the courts both of this country and England, and it is quite certain that an agent employed to sell personal property, whom the owner entrusts with the possession and delivery of it, has *prima facie* authority to receive the price upon a cash sale. But if the principal is known and the sale is made upon a credit, it is perhaps doubtful whether authority to collect can be presumed solely from authority to sell. The chief contention has, however, arisen in those cases in which the agent had not been entrusted with the possession or delivery of the goods, and here it must be conceded that a uniform doctrine has not always prevailed.

Where a broker not entrusted with possession of goods, contracted to sell the same with a person having no knowledge of his agency, and his principals, on being notified of the sale, without knowledge that he had contracted in his own name, and without conduct on their part clothing him with authority to receive payment, or with any possession actual or constructive, delivered the goods to the vendee, the Supreme Court of Ohio held, in a late case,[19] that payment to the broker did not bar a recovery by the owners. The same ruling was made by the New York Court of

7 Williams v. Walker, 2 Sandf. Ch. 325; Whitlock v. Waltham, 1 Salk. 157; Henn v. Coulsby, 1 Cha. Cas. 93; s. c. 1 Eq. Ca. Abr. 145; Gerard v. Baker, 1 Cha. Cas. 94; s.c. 1 Eq. Cas.Abr. 145; Roberts v. Matthews, 1 Vern. 150; Wostenholm v. Davies, Freem. Ch. 289; s. c. 2 Eq. Ca. Abr. 709.

8 De Ro v. Cordes, 4 Cal. 117; Bonsfield v. Creswell, 2 Camp. 545.

9 De Ro v. Cordes, *Supra.*

10 Williams v. Walker, *supra*; Smith v. Kidd, 68 N. Y. 130.

11 Doubleday v. Cress, 50 N. Y. 410.

12 Rice v. Draper, *supra.*

13 Peck v. Harriot, 6 Sergt. & R. 146.

14 Yerby v. Grigsby, 9 Leigh, (Va.) 387.

15 Mynn v. Joliffe, 1 Mood. & R. 326.

16 Galbreath v. Cole, 61 Ala. 140; Reynolds v. Ferree, 86 Ill. 570.

17 21 Ark. 396.

18 2 Liv. on Agency, 284, 285.

19 Crosby v. Hill, 28 Alb. L. J. 376; s. c. 39 Ohio St.

Appeals,[20] in a case where the broker's agency was known, and the purchaser was aware that plaintiff was the owner before the property was delivered; and by the Kentucky Court of Appeals,[21] in the case of a payment made to commission merchants for goods sold by them, by sample, there being evidence tending to show that the purchaser knew that they had not possession of the goods at the time of sale, and that they acted as agents of the appellants, who shipped the goods to the purchasers directly. So where a salesman in plaintiff's store, employed to sell goods on commission, but not entrusted with their possession or delivery, sold a bill to defendant on a credit, who paid the bill to the salesman before it was due with a deduction for cash, the Supreme Court of Pennsylvania decided that the defense of payment was incomplete without evidence of some delegation of authority to the agent other than that necessarily implied in authority to make sales;[22] the court remarking, "As a check his employers seem to have retained in their own hands the delivery of the goods and the appointment of the terms of sale. The goods in question were so delivered as to inform the defendants sufficiently of the the character of the agency. When the agreement had been made for payment in six months the contract was complete. The subsequent acceptance of cash with a deduction of five per centum from the bill was a new and totally unauthorized arrangement on the agent's part. In making payment, the defendants took the risk of his integrity and they must bear the loss which his unfaithfulness imposed."

In a New Jersey case[23] the facts of which were nearly identical with the addition that the payment to the salesman was not made at plaintiff's place of business, and that the plaintiff upon shipment of the goods, sent defendant a bill of the same, on the face of which a notice was printed that salesmen were not authorized to collect through his bookkeeper and which defendant did not see, examined it and told him it was correct, but did not seal the notice. It was held that the circumstances did not warrant the inference of authority to the salesman to receive payment; and a verdict for defendant was set aside as contrary to law. The court placed the decision upon the ground that "the plaintiff did all in his power to prevent the defendant falling into an error in regard to the authority of his salesman; that not to have seen the direction in the bill head was the grossest negligence and to permit a party to defend under the protection of his own carlessness would be to offer a premium for negligence and open the door to fraud."

Traveling Salesmen.—The Supreme Courts of the states of Michigan, Illinois, Missouri and Wisconsin and the Illinois Appellate Court[24] have decided that salesmen or agents employed by commercial houses to travel and sell goods by sample or to solicit orders to be sent to their principals for approval and to be filled by them if accepted, have no implied or incidental authority to receive payment; and the determination is based upon two grounds, (1) that the principal has retained the power to sell in his own hands, the agent's only power being to take propositions, which his employer may accept or not or at most to make conditional sales, and (2) granting the agent's power to conclude sales, the goods to be shipped by his principal, such power does not carry with it the power to collect.[25] So too the law probably is in England;[26] the language of the court in Rice v. Goffman,[27] so far as it conflicts with these conclusions, has been explained and limited.[28] But the authority of such an agent to collect may be established by proof of other acts by the agent of similar character with the principal's tacit or express consent, or the general course of dealing other transactions between the parties; as where an agent to take orders for

[20] Higgins v. Moore, 34 N. Y. 417; s. c. 6 Bosw. 344.
[21] Graham v. Duckwall, 8 Bush. (Ky.) 12.
[22] Seiple v. Irwin, 30 Pa. St. 513.
[23] Law v. Stokes, 32 N. J. Law 249.

[24] Kosemann v. Moneghan, 24 Mich. 36; Clark v. Smith, 88 Ill. 298; Abrahams v. Weiller, 87 Ill. 179; Butler v. Donnan, 68 Mo. 298; McKindly v. Dunham, 55 Wis. 515 s. c. 15 Rep. 127; Greenhood v. Keater, 9 Brad, (Ill. App.) 183.
[25] McKindly v. Dunham, *supra*; Greenhood v. Keator *supra*, Ewell's Evan's Agency (118) 163, see generally as to authority of commercial travelers; Divessy v. Kellogg, 44 Ill. 114; Herring v. Hottendorf, 74 N. C. 588; Stoddart v. Warren, 7 Rep. 517, (U. S. C. C. N. D. Ill.)
[26] Puttock v. Warr, 3 Hurl & N. 979; But see Howard v. Chapman, 4 C & P 508.
[27] 56 Mo. 434.
[28] Butler v. Donnan, *supra*.

safes received an old safe in part payment for a new safe sold by him, which his principal accepted, the debtor was held to be justified in believing the agent authorized to collect the balance.[29] The usages of a particular trade or business or of a particular class of agents are admissible not for the purpose of enlarging the powers of agents employed therein but for the purpose of interpreting those powers;[30] and hence resort can not be had to a usage of trade to establish an agent's authority to receive payment, when not actually conferred or implied according to the rules of law. Such usage would give a clear addition to, and not an explanation of his authority and is illegal.[31]

In Lumley v. Corbett[32] the facts of which somewhat resemble those in cases already referred to, payment to a broker who did not have actual possession of the goods sold, was held to be well made. It is well to observe however, that the circumstances were not calculated to inform the buyer of the broker's agency or the plaintiff's ownership. The buyer did not receive the goods directly from plaintiff but the broker procured from plaintiff and delivered to defendant plaintiff's order for the goods addressed to another person. The decision is sustainable upon other grounds but it is submitted that under the circumstances entrusting the broker to deliver the order for the goods was legally the equivalent of entrusting him to make a manual delivery. Strikingly analogous to the case just noticed is that of Capel v. Thornton decided by Lord Tenterden at *nisi prius* and sometimes relied on as authority for the broad proposition that an agent empowered to sell has implied power to receive the proceeds of sale. It was an action for the price of coals and at the trial, the following facts appearing, the plaintiffs were called: Plaintiff's servant delivered the coals at defendant's house and gave to his footman a vendor's ticket in plaintiff's name which however was not proved to have reached the defendant. The defendant ordered the coals of one E. who professed to sell on his own account but unknown to defendant sold on commission, and receiving a bill of parcels in E's name paid him the amount. Subsequently plaintiffs notified defendants to pay them or their clerk and not E. Here E's agency was not known nor was there a circumstance to arouse the defendants suspicion of it, all of which was attributable to the act of plaintiff's servant in delivering the vendor's ticket to the footman who was not proved and could not be presumed to be his master's agent for the purpose; through the servant's negligence which was plaintiff's negligence, E apparently had possession of and delivered the goods; and besides in our opinion the notice not to pay E amounted to a recognition of his apparent authority to collect. It is submitted that the case does not go beyond the rules as laid down in the authorities already quoted.

We are unable to reconcile with the doctrine of the foregoing authorities, the cases of Hoskins v. Johnson[33] and Putman v. French.[34] The ormer is the earliest reported case in this country of which we are aware relating to the authority of traveling agents or "drummers" to collect, and quite strangely it seems never to have been cited or referred to in the subsequent cases upon that question. The court appears to have held that the jury, might presume authority to collect solely from authority to take orders. In Putman v. French, plaintiff's travelling agent obtained from defendant, an order for goods and sent it to his employers who shipped the goods, sending defendants a bill with the words thereon, "payable at office" which however they did not see, though they examined the bill as to items charged. It was agreed with the agent that the bill might be paid at H. where defendants resided, plaintiff's place of business being at Boston. Defendants paid the agent at H. believing he was, as he claimed to be, a partner in the plaintiff firm. It was customary in H, and vicinity either to pay travelling salesmen or remit to the firm. The decision of the court, which was in favor of the defendant, is unquestionably at variance with the current of adjudication and we incline to question its soundness upon principle. Even granting the proposition, as-

[29] Harris v. Simmerman, 81 Ill. 413; Stewart v. Aberdein, 4 Mees. & W. 211; Higgins v. Moore, 34 N. Y. 417.

[30] Story on Agency, 474.

[31] Higgins v. Moore, 34 N. Y. 417. Evans v. Waln 71 Pa. St. 69.

[32] 18 Cal. 494; Capel v. Thornton, 3 Carr. & P. 352.

[33] 5 Sneed 469.

[34] 53 Vt. 402 S. C. 12 Rep. 543. 38 Am. Rep. 682.

sumed by the court, and a pivotal point in its reasoning, that a traveling salesman has apparent authority to conclude a sale and make terms of payment as to time and place, yet does not a purchaser act at his peril upon a mere appearance of authority when his ignorance of the real authority is ascribable solely to his omission to read in full the bill accompanying the goods? Again though he ordinarily have "the right to suppose that the goods were shipped in precise pursuance of the arrangement made with the salesman" has not the seller equal right, in the absence of advice to the contrary, to conclude that the terms specified in the bill of sale are the same as were made by the agent or are assented to by the purchaser? The court does not indicate and it is not perceived what the plaintiffs omitted to prevent the defendants mistaking the extent of the salesman's intended authority but on the other hand it seems to be conceded by the opinion that the defendants were somewhat negligent. Our own inference from the evidence would have been that defendants paid the agent not upon the faith of his apparent authority as a mere traveling salesman but upon his misrepresentation that he was a partner. The custom shown was at most merely local and could not affect the plaintiffs who were not proved to have any knowledge of it.[35]

Must receive money.—An agent empowered to collect a debt has ordinarily no authority to receive any thing but money in payment.[36] He cannot commute the debt for another thing,[37] or release it upon composition or compromise,[38] or without payment,[39] or pledge it,[40] or obtain judgment upon it for his own use;[41] or accept goods,[42] choses in action,[43] depreciated bank bills,[44] or his own debt to the debtor[45] in payment, unless specially authorized. But the authority may be shown by the course of dealing between the parties.[46]

Neither can he extend the time of payment.[47] An attorney in whose hands a note is placed for collection can not under a general retainer delegate his authority to receive payment to a third person.[48] Authority to collect will not include power to endorse a check received in payment.[49]

Madison, Wis. J. H.

35 Higgins v. Moore, 34 N. Y. 417.
36 Graydon v. Patterson, 13 Iowa, 256.
37 Padfield v. Green, 85 Ill. 529; McAny v. Schenk, 88 Ill. 357; Miller v. Edmonston, 8 Blackf. 291.
38 Padfield v. Green, *supra*.
39 Kirk v. Heatt, 2 Carter (Ind.) 322.
40 Padfield v. Green, *supra*.
41 Padfield v. Green, *supra*.
42 Howard v. Chapman, 4 C. & P. 508; Hoffman v. Han. Mut. Ins. Co. 92 U. S. 161.
43 Wales v. Neal, 65 Ala. 59; McCulloch v. McKee, 16 Pa. St. 289; 1 Carter (Ind.) 329.
44 Ward v. Smith, 7 Wall 447.
45 Miderwood v. Nicholls, 17 C. B. 239; Catteral v. Hindle, L. R. 1 C. P. 186; Todd v. Read, 4 B & Ald. 210.
46 Stewart v, Aberdein, 4 Mees. & W. 211.
47 Rich v. Smith, 82 N. Y. 627, 10 Rep. 78, 41 N. Y. 155.
48 Kellogg v. Norris, 10 Ark. 18; Danley v. Crawl, 28 Ark. 95.
49 Robinson v. Chem. Nat. Bk. 13 Rep. 23; Graham v. U. S. Sav. Institution, 46 Mo. 18 .

MASTER AND SERVANT—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE — EVIDENCE — INSTRUCTIONS — CHARACTER OF DECEASED—SIMILAR ACTS.

THE CHICAGO, ETC., R. CO. v. CLARK.

Supreme Court of Illinois, November 20, 1883.

1. In an action to recover damages for injuries resulting in the death of a brakeman, it appeared that there was no witness to the transaction, *held*, that under such circumstances, evidence of the prior habits of the deceased as to care, prudence and sobriety is admissible as tending to prove that he was not guilty of contributory negligence, but where there were witnesses who saw the transaction, such evidence is not admissible.

2. Evidence of the usual mode of coupling and uncoupling cars at the switch where the deceased was injured, is not admissible as tending to prove due care on his part; what others did or were in the habit of doing, did not tend to prove that he was in the exercise of due care, for such a course may have been careless, and even reckless, and would not justify the deceased in omitting to observe care.

3. It is error to instruct the jury that it is the duty of the master to inform his servants of all danger in and about the premises where they are required by his authority to perform labor. Employes assume the ordinary risks and hazards of the employment; and the presumption is, that they understand the nature and dangers of such employment, and, if not, that they will inform themselves.

4. Plaintiff's intestate was injured in attempting to couple cars at side track, adjacent to a platform used for loading stone. In making the coupling he got between the platform and cars, and his lantern, from some cause, got between him and the cars, and was so pressed against him as to inflict injuries from which he died. It was claimed that the defendant was negligent in constructing the platform so near the track. The court instructed the jury that if the track and platform were dangerous, and the company by rea-

sonable care could have learned the fact, and deceased was without knowledge, and could not, by reasonable care, have learned that it was dangerous, and by reason thereof received the injuries complained of, they should find the defendant guilty. *Held*, that the instruction was erroneous; that reasonable care when exercised by the company, could only be expected to reach the same result that would follow from the same care on the part of the deceased; that if his care and diligence could not learn that the platform was dangerous, it was unreasonable to impute notice, or negligence in not knowing, to the defendant.

WALKER, J., delivered the opinion of the court:

Appellee brought this action in the circuit court of Peoria county, against appellant, to recover for the death of her husband, J. H. Clark, averred to have been caused by negligence of the railroad company. It appears that deceased was a brakeman in the employment of appellant. That at Davidson's quarry, near the city of Joliet, he was injured in attempting to couple cars at a sidetrack and platform for loading cars with stone. That in coupling them he got between the platform and cars, and his lantern, from some cause, got between him and the cars, and it was so pressed against him that he received internal injuries from which he died.

The negligence averred is, that the track was constructed too near, or close to the platform. That the distance between the cars when on the track and the platform, did not exceed ten inches. That on the second day of July, 1879, in the night, Clark, in the line of his duty, exercising due care, was engaged in coupling a car loaded with stone, and the defendant's servants in charge of the train handled it so negligently, together with the improper location and construction of the platform, that the train struck Clark with great force, and he was thereby killed. It is averred that deceased did not know of the dangerous character of the place, and was ignorant of the distance or space between the platform and cars, but defendant knew it was dangerous but failed to notify deceased of the fact.

On a trial in the circuit court, plaintiff recovered a judgment. Defendant appealed to the appellate court for the second district, where judgment was affirmed and defendant appeals to this court.

It is first insisted that the circuit court erred in admitting evidence of the habits of deceased as to care, prudence and sobriety. Appellee in her declaration averred, as she was required to do, that deceased was in the exercise of due care at the time he sustained the injury of which he died. And as no person was present or knew how the accident occurred, we think this evidence tended to prove that averment. If he was habitually prudent, cautious and temperate, it tended to prove he was so at the time of the injury, which with the instinct of self preservation, would be evidence for the consideration of the jury in determining whether he was in the exercise of care. Had there been witnesses who saw the infliction of the injury, the jury could then have determined from such evidence whether he was careful or negligent, and in such a case this evidence would not be admissible. Where there are no witnesses to describe such an occurrence, the defendant would surely have the right to prove the person was habitually rash, imprudent and intemperate, to repel the presumption that he was in the exercise of proper care at the time he received the injury. If evidence is admissible for any purpose, it must be received, and the party against whom it is admitted, if it tends to mislead on some other question, is entitled to have it limited by instruction, to the purpose for which it is admissible.

It is next urged that the trial court erred in admitting evidence as to the usual mode of coupling and uncoupling cars at that switch. One of the issues being tried was whether deceased performed his duty with such negligence as to preclude a recovery. He was bound to use care or no recovery can be had. And what others did, or were in the habit of doing, did not tend to prove that issue. Such a course may have been careless and even reckless, and if so, it did not justify him in omitting the observance of care. We therefore think that such evidence did not tend to prove care on the part of deceased, and the court erred in its admission.

It is claimed the first instruction is erroneous. It, among other thing, informs the jury that it is the duty of the master to inform his servants of all danger in and about the premises where they are required by his authority to perform labor. This was manifestly wrong. Railroad employees, as all the books lay down the doctrine, assume the ordinary risks and hazards of the employment. The presumption is that the employee understands the nature and dangers of the employment when he engages in the service, and if not, that he will inform himself. It would be wholly impracticable for railroads and manufacturers to employ men of experience to inform each of the hands that any particular act they are required to perform is dangerous. It would be ruinous to such bodies to hire a person to accompany every brakeman and other employee, to inform them of danger in the performance of any act of duty, or of the dange in the manner of its performance. It is impossible that the law can ever impose such requirement and that is what this instruction, in substance, asserts as a legal requirement.

The instructions further informs the jury that i the employer knows of such danger, and the employees do not, and are unable to learn the danger by reasonable care and diligence, and the employer fails to advise the employees of the danger, he is, in such case, liable for any injury they sustain. And if the jury believe in this case, that the stone platform was dangerous, and defendant failed to advise deceased thereof, and the deceased did not know of such danger, and could not have learned it by the use of reasonable care, and he was

thereby injured, from which he died, then the jury should find the defendant guilty. This branch of the instruction is erroneous, and misstates the law. Moreover there is no evidence tending to prove the company had any notice that the platform was dangerous, on the contrary it had been used for fourteen years in the same condition it was then in, and many thousand cars had been coupled and uncoupled at that place, and on the same side of the track where deceased was injured and this was the first accident of the kind that had ever occurred on that switch.

But the instruction announces that appellant was liable whether the company knew or not that it was dangerous. It informed the jury that if it was dangerous, they should find the appellant guilty. This instruction was highly calculated to mislead the jury, and should not have been given.

The fourth of appellee's instructions is flatly contradictory, and calculated to confuse and mislead. It asserts that if the track and platform were dangerous, and the company by reasonable care could have learned the fact, and deceased was without knowledge, and could not by reasonable care have learned it was dangerous, and deceased received his injuries thereby, they should find the defendant guilty. If deceased could not learn that the place was dangerous by reasonable care, how can appellant be held liable because it did not learn the fact. Reasonable care only could, when exercised by the company, reach the same results that would be obtained by the use of the same care used by deceased. If his care and diligence could not learn that it was dangerous, it is unreasonable to hold appellant liable, when by the same care appellant could not learn that there was danger.

The seventh of appellee's instructions is loosely drawn, and is not accurate in its statement of the law. It first asserts that if appellant was guilty of negligence, as averred in the declaration, and if deceased was guilty of negligence, if they found from the evidence that appellant was guilty of gross negligence, then it cannot relieve itself from liability, by showing that deceased was also guilty of negligence, if his negligence was slight as compared with appellant's. The instruction speaks of negligence and also of gross negligence of appellant, and then refers to slight negligence of deceased as compared with appellant's negligence. Which degree of negligence of appellant are the jury to compare with negligence of deceased. But above and beyond this, there was no evidence tending to show gross negligence of appellant. There was therefore no evidence upon which to base the instruction. It was therefore error to give it.

For the errors indicated, the judgment of the appellate court is reversed, and the cause remanded. Judgment reversed.

NOTE.—The general rule on the subject of permitting testimony to be given of matters not alleged or in issue, is that nothing shall be offered which does not directly tend to the proof or disproof of the matter in issue. State v. Wisdom, 8 Porter, 511. The facts to be proved must be capable of affording a reasonable presumption or inference from which the existence of the fact disputed may be deduced; Governor v. Campbell, 17 Ala. 566; the object being to prevent the minds of the jury being distracted, and the public time needlessly wasted, Ib. Thus, a party charged with fraud can not offer evidence of his good character to repel the charge, Pearsall v. McCartney, 28 Ala. 110; Ward v. Herndon, 5 Port. 382; Goldsmith v. Picard, 27 Ala. 142. In an action brought for the alleged breach of one stipulation in a contract, performance of another stipulation can not be given to disprove the plaintiff's claim, Fail v. McRee, 36 Ala. 61. So in an action for a wrongful attachment, evidence "of what other merchants made in the plaintiff's neighborhood" is not competent. O'Grady v. Julian, 34 Ala. 88. So upon the issue whether it was cold enough to freeze ink, evidence that it was not cold enough to freeze apples is not admissible. Ingleden v. Northern R. R., 7 Gray, 86. So, where the dispute was whether a sale was absolute or conditional, other sales subject to the alleged condition were not matters of proof. Hollingham v. Head, 4 C. B. N. S. 388. In an action against a ferryman for negligence, it cannot be shown by the defendant that other ferrymen on the same river put up chains at the ends of the boats only when requested by passengers. Miller v. Pendleton, 8 Gray, 547. Upon the issue whether a way was defective or not, it can not be shown that other persons passed and repassed with safety. Aldrich v. Pelham, 1 Gray, 510; Kidder v. Dunstable, 11 Id. 342; Merrill v. Bradford, 110 Mass. 505, 134. In an action against a copper company for injuring plaintiff's land with its noxious gases and substances, evidence that other lands exposed to the same influences were unimpaired, is incompetent. Lincoln v. Taunton Copper Co., 9 Allen, 181. And upon the issue of how often rent was to be paid, the times at which other tenants of the plaintiff paid cannot be shown. Carter v. Prkye, Peake, 95. The reasonableness of a doctor's charge can not be proved by testimony of a witness as to what the same doctor had charged him in a similar case. Collins v. Fowler, 4 Ala. 647. And to prove a charge of negligence, evidence that at previous times the bell had not been rung, is inadmissible to show negligence. C., B. & Q. R. Co. v. Lee, 60 Ill. 501; Robinson v. Fitchburg R. Co., 7 Gray, 92; S. P. in Maguire v. Middlesex R. Co., 115 Mass. 239; Miss. Cent. R. Co. v. Miller, 40 Miss. 45; Wentworth v. Smith, 44 N. H. 419, 423. But see Boyce v. Cheshire R. R., 43 N. H. 627. Evidence in a a suit for the value of a cow lost on a railroad, that there was a good deal of trouble with the company, is improper. C. & N. W. Ry. Co. v. Cass, 73 Ill. 395. So where the issue was whether credit had been given to the defendant's wife or her father, the fact that other tradesmen had trusted the latter may not be shown. Smith v. Wilkins, 6 C. & P. 180. See Delamotte v. Lane, 9 C. & P. 261. So where the question was whether an embankment had choked up a harbor, evidence that similar embankments had choked up other harbors was admitted. Folkes v. Chadd, 3 Dougl. 157.

The general reputation of a person can satisfy no one as to the conduct of a party at a particular time. In Eaton v. Telegraph Co., 68 Me. 63, it is said that "the fact of a person having once or many times in his life done a particular act in a particular way, does not prove that he has done the same thing in the same way upon another and different occasion." Still a notary may state his customary habits, relative to negotiable paper. Union Bank v. Stone, 50 Me. 595. And to show that a horse was a gentle one, it may be

shown how near he approached trains and never shied. Clinton v. Howard, 42 Conn. 50. And to disprove negligence in a servant, his general character for carefulness has been held admissible. Otis v. Thorn, 23 Ala. 469. But a plaintiff can not repel the imputation that he contributed to the injury by his lack of due care by evidence of his general reputation for the exercise of due care. McDonald v. Savoy, 110 Mass. 49, following Turney v. Tuttle, 1 Allen, 185; Gahagan v. Boston etc. R. R. Co., 1 Allen, 187. See *dictum* to the contrary in Adams v. Carlisle, 21 Pick. 146. In an action to recover the amount of a tavern bill, the defendant can not prove his general habits for sobriety, to show that he could not have drank the quantity charged to him. Jones v. Cooper, 22 Ala. 551. So in an action for damages caused by a defect in the highway, the driver can not be shown on prior occasions to have appeared to have been a competent driver. Lawrence v. Mt. Vernon, 35 Me. 100. But where the claim was made that an accident was due to the bad habits of a horse, and not to the fault of the town, evidence of the character and habits of the horse was admitted. Todd v. Rowley, 8 Allen, 51; Maggi v. Cutts, 123 Mass. 535. See article of writer in 16 CENT. L. J. 202. In an action against a railroad company for frightening the plaintiff's horse by a whistle, evidence of the effect of the whistle upon other horses at the same time and place is admissible. Hill v. Portland R. R. Co., 55 Me. 438. But where a certain credit was allowed on other sales, evidence of such credit is admissible to explain a subsequent sale. Tibbets v. Sumner, 19 Pick. 166. So where a merchant sought to fix the defendant's liability as principal of one A, for goods sold him, the defendant may prove that A made other purchases of the same kind on his own account. Connor v. Parks, 10 Cush. 265. But where the issue was whether the defendant had ordered work done on a certain house, others were allowed to testify that they had done work upon the same house upon his order. Woodward v. Buchanan, 5 L. R. Q. B. 285. See Rowe v. Brenton, 8 B. & C. 758; 3 M. & R. 143, 230; 8 B. & C. 765. In an action against a town, for negligence in maintaining a defective highway, it is competent to show the condition of similar portions of similar ways in other towns, upon the issue of due care. Raymond v. Lowell, 6 Cush. 524; Packard v. New Bedford, 9 Allen, 200, provided the plaintiff knew of the practice in the other towns. Hinckley v. Barnstable, 109 Mass. 126. But see George v. Haverhill, 110 Mass. 506; Littleton v. Richardson, 32 N. H. 60; Hubbard v. Concord, 35 Id. 54. To show that the defendants took the plaintiff's goods as common carriers, they may be shown to have been common carriers some years before. Steele v. McTyler, 31 Ala. 667. Evidence of the quality of beer sold to other publicans, is not competent to prove that the beer sold to the defendant was good. Holcombe v. Huvson, 2 Camp. 391. But upon the question whether a common carrier was negligent in shipping goods by water, the condition in which the same class of goods usually arrived at the same place, may be shown by both parties. Steele v. Townshend, 37 Ala. 247. So a purchaser of cotton seed may show that other seed sold by the vendor at the same time, would not germinate. Buchanan v. Collins, 42 Ala. 419. In an action against a gas company for negligently allowing its gas to escape into the plaintiff's well, the fact that other wells in the neighborhood were similarly affected, may be shown. Ottawa Gas Light Co. v. Graham, 35 Ill. 346. In a suit for ovens sold, in which the defense was made that they were not of the size agreed upon, others can not testify that the plaintiffs had delivered them ovens of the alleged size. Vale v. Butler, 111 Mass. 55. See Waters etc. Co. v. Smith, 120 Mass. 444. In an action against a common carrier for non-delivery of goods after transportation, they can not show their care of other goods, to prove that they gave the plaintiff's goods the same attention. Lane v. R. R. Co., 112 Mass. 455. But *contra* in Cass v. Boston, etc. R. R. Co., 14 Allen, 449; Lane v. B. & A. R. R., 112 Mass. 455. So in an action against a ferry man for carelessness in not guarding animals, he can not show that for thirty years the same protection had been afforded and no accident happened. Lewis v. Smith, 107 Mass. 334. See Fitchburg; R. R. v. Freeman, 12 Gray, 401; Berkshire Woolen Co. v. Proctor, 7 Cush. 417; Lichtenstein v. B. & P. R. R. Co., 11 Cush. 70. In an action against a carrier, where the latter set up that the goods were improperly manufactured, which fact occasioned the loss, he may show that similar goods of the same manufacturer, exported by other vessels by other persons, were lost in the same way. Bradford v. Boylston Ins. Co., 11 Pick. 162. So in action for deceit, in the sale of goods another purchaser may testify that, at about the same time, the defendant had offered him every facility for the examination of the goods, thus rebutting the plaintiff's claim that the defendant had prevented inspection. Salem India Rubber Co. v. Adams, 23 Pick. 256. To show fraud in the vendee of the goods, it is competent to show that he committed similar frauds upon others. McKenney v. Dingley, 4 Me. 172; Foster v. Hall, 12 Pick. 89, 307; Lynde v. McGregor, 3 Allen, 172; Richardson v. Brackett, 101 Mass. 497; Jordan v. Osgood, 109 Mass. 457; Hall v. Naylor, 18 N. Y. 588; Horton v. Weiner, 124 Mass. 92. See Benham v. Cary, 11 Wend. 83; Cary v. Hotaling, 1 Hill, 311; French v. White, 5 Duer. 254; Rowley v. Bigelow, 12 Pick. 307; Wiggin v. Day, 9 Gray, 97; Jordan v. Osgood, 109 Mass. 457; but it seems that a general conspiracy to defraud must appear. Luckey v. Roberts, 25 Conn. 492. And to show that the plaintiff insured a vessel with the fraudulent design to procure its loss, a series of suspicious losses of other vessels owned by the plaintiff may be shown. Hoxie v. Home Ins. Co., 32 Conn. 37. So where a debtor makes several deeds to relatives simultaneously, all may be shown to prove fraud in each. Thomas v. Beck, 39 Conn. 243. But see, Edwards v. Warner, 35 Conn. 519; Shattuck v. Woods, 1 Pick. 71; Williams v. Powell, 101 Mass. 467.—[ED. CENT. L. J.]

ENTIRETY—CONVEYANCE TO HUSBAND AND WIFE—MORTGAGE BY BOTH FOR HIS DEBT, VOID.

DODGE v. KINZY.

Supreme Court of Indiana, Jan. 23, 1884.

1. Husband and wife who take a conveyance of real estate to themselves in their joint names without any designation of the manner in which the same shall be holden, become tenants by entireties.

2. A statute abolishing all the legal disabilities of a married woman, but prohibiting her from becoming, in any manner whatever, surety for her husband, renders void a mortgage given by the husband and wife upon real estate held by them as tenants by entireties to secure the payment of her husband's debt.

HOWK, C. J., delivered the opinion of the court:

This suit was brought by the appellant to foreclose a certain mortgage, alleged to have been executed by the appellees to one Abram Upp on Feb. 23rd. 1882, on certain real estate particularly ascribed, in the city and county of Elkhart, and to collect the debt claimed to have been secured by such mortgage. The appellees jointly, and each of them separately, demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action. Before the court made any ruling upon either of these demurrers, the appellees jointly filed their cross-complaint against the appellant, wherein they asked that the mortgage, described in appellant's complaint, might be cancelled of record, and that their title to the mortgaged real estate might be quieted. To this cross complaint the appellants demurred, for the want of sufficient facts therein to constitute a cause of action, was overruled by the court, and, at the same time, the court sustained the appellees' demurrers to the appellant's complaints. Exceptions were saved by the appellants to each of the courts rulings adverse to him, and declining to amend his complaint, or answer the cross complaint, the court rendered judgment against him, in appellee's favor, in accordance with the prayer of the cross complaint. The facts of this case as stated in the complaint and cross complaint, were substantially as follows: The real estate described in the mortgage, which the appellant sought to foreclose in this action, was conveyed on the 27th day of July 1878, to the appellees then and ever since husband and wife, by a deed regular in form, wherein they were designated as the grantees by the following descrption, namely: "To John S. Kinzy and Elizabeth A. Kinzey, husband and wife." On the 23rd. day of Feb. 1882, the appellee John S. Kinzy borrowed of Abram Upp, the sum of $1000 and gave his note therefor, due in three years after its date, and, on the same day, both the appellees, John S. Kinzy and Elizabeth A., his wife executed the mortgage, in suit upon the real estate so owned and held by the mortgagors, under the aforesaid deed of July 27th. 1878. Afterwards John S. Kinzy became insolvent and on April 25th. 1882, executed a chattel mortgage to said Abram Upp, as an additional security for the said sum of $1000 previously borrowed of said Upp by the said John S. Kinzy, and it was then agreed between him, Kinzy and Upp, that the said sum of $100 evidenced by the note above described, should at once become due. Afterwards certain other creditors of John S. Kinzy commenced suits against him, and, on April 28th, 1882, sued out orders of attachment, in such suits, which became and were liens on the goods and chattels theretofore mortgaged as aforesaid by the said Kinzy to Abram Upp, as such additional security for the money so borrowed of him by the said John S. Kinzy. On his own application, Upp was made a party to such suits in attachment, and such proceedings were thereafter had therein as hat it was ordered by the court, that the said sum of money so borrowed by the said John S. Kinzy, should be repaid to Abram Upp, out of the proceeds of the mortgaged goods and chattels so attached as aforesaid, and that he, Abram Upp, should thereupon assign his real estate mortgage to the appellant, Henry C. Dodge, as trustee for such attaching creditors of John S. Kinzy, all of which was done accordingly. In their respective suits, the attaching creditors severally recovered personal judgments against the said John S. Kinzy, for the amount of his debts, due them respectively. It might be said perhaps that the real estate mortgage was only an incident of the debt of John S. Kinzy secured thereby; and that, as it appeared that such debt was fully paid off and satisfied, the mortgage was *functus officio*, and extinguished and nothing passed by the assignment thereof to the appellant as trustee. But the appellee's counsel in his brief of this cause, rests the defense to the appellant's action upon a single point; and, therefore, any other defense which might suggest itself or be suggested will be regarded as expressly waived. Counsel says: "I make no question about the right of the appellant to maintain this suit, in the form and at the time it was brought, the only question I do make, is that the mortgage in suit was and is void." This is the question we will briefly consider and decide. It will be seen from our statement of facts of this case, that the land described in the mortgage in suit more than three years prior to the date of such mortgage, was conveyed to the appellees then and since husband and wife, by a deed regular in form, wherein they were thus designated as the grantees, to-wit: "To John S. Kinzy and Elizabeth A. Kinzy, husband and wife." Where land is thus conveyed to husband and wife, the estate taken by the grantees is governed by the common law rule which has never been changed by any statute in this State, but, on the contrary, is expressly recognized in sec. 2922 and 2923, R. S. 1881, in force since May 6th, 1853. The rule is thus stated in Davis v. Clark, 26 Ind. 424: "At common law, if an estate is granted, as in this case, to a man and his wife, they are neither properly joint tenants nor tenants in common, for husband and wife being considered one person in law, they can not take the estate by moities; both are seized of the entirety, *per tout*, and not *per my*. Neither can dispose of any part of the estate without the assent of the other, but the whole must remain to the survivor." Accordingly it was held in the case cited, that, where land thus conveyed to husband and wife, the husband did not take an estate in such land, which he could convey or encumber by his own act or deed without the assent of the wife, or which could be subjected to sale on an execution against the husband. Such has been the uniform line of decision in this court, upon the question under consideration. Bevins v. Cline, 21 Ind. 37; Arnold v. Arnold, 30 Ind. 305; Chandler v. Cheney, 37 Ind. 391; Jones v. Chandler, 40 Ind. 588; Anderson v. Tannehill, 42 Ind. 141; McConnell v. Martin, 52

Ind. 434; Hulett v. Inlow, 57 Ind. 412; Lash v. Lash, 58 Ind. 526; Patton v. Rankin, 68 Ind. 245; Edwards v. Beall, 75 Ind. 401; Carver v. Smith, decided at last term; Morrison v. Seybold, decided at present term. Certainly, there has never been an express repeal, by direct legislation of the common law rule governing the conveyances of real estate to husband and wife. Repeals by implication are not favored in law, and when the courts hold that any statutory provision is repealed by implication, it is done because the legislative intent to supersede such provision is clearly manifested in the subsequent legislation. So also a statute in derogation of the common law must be strictly construed. Water Works Co. v. Burkhart, 41 Ind. 364; Cruse v. Axtell, 50 Ind. 49, 58; Haas v. Shaw, decided at last term. Under the common law rule, it is clear that, at the date of the mortgage in suit, John S. Kinzy alone could not have executed a valid mortgage on the real estate described therein. But perhaps the mortgage executed by him and his wife would have been valid and binding on each of them, under the rules of the common law, if the wife was not, at the time, prohibited by statute from entering into such mortgage contract. In sec. 5119 R. S. 1881, in force since September 19, 1881, and at the date of the mortgage now in suit, it is provided as follows: "A married woman shall not enter into any contract of suretyship, whether as indorser, guarantor, or in any other manner, and such contract as to her shall be void." The provisions of this section of the statute are too plain to be misunderstood. They positively forbid a married woman to enter into any contract of suretyship in any manner, and so positively declare that any such contract, as to her, shall be void. In the case at bar, we need not argue for the purpose of showing that, in executing the mortgage sued upon, the appellee, Elizabeth A. Kinzy, entered into a contract of suretyship for the purpose of securing the individual debt of her husband, John S. Kinzy. This being so, and it can not be otherwise, the mortgage was void as to Elizabeth A. Kinzy, under the statute. Allen v. Davis, decided at present term. Being void as to her, the wife, the mortgage was necessarily void as to John Kinzy, the husband; for, under the common law rule, he had no estate in the land described in the mortgage, which he could convey or incumber by his individual act or deed. In Chandler v. Cheney, *supra*, it was expressly held by this court that a mortgage, executed by the husband alone upon an estate held by entireties, by husband and wife is absolutely void. Our conclusion is, therefore, that the mortgage in suit was and is void, as against each and both of the appellees, and that the court did not err, in sustaining their demurrers to the appellants complaint. This conclusion renders it unnecessary for us to consider the error assigned by appellant, upon the overruling of his demurrer to appellees' cross-complaint. For, in the brief of this cause, the appellants counsel say: The question to be decided is not complicated by the cross-complaint. If the ruling by the court, upon the demurrer to the appellant's complaint is correct, the ruling on the cross-complaint must perforce be correct. We find no error in the record, which authorizes or requires the reversal of the judgment.

The judgment is affirmed with costs.

NOTE.—Next week we will publish an article from the pen of W. W. Thornton, Esq., reviewing the above decision and exhaustively treating the subject of "tenancies by the entireties."—[ED. CENT. L. J.]

WEEKLY DIGEST OF RECENT CASES.

1. ADMIRALTY—COLLISION—WHEN LOSS RESULTING FROM, SHOULD BE DIVIDED.

Even gross fault committed by one of two vessels approaching each other from opposite directions, does not excuse the other from observing every proper precaution to prevent a collision; and when, if such precaution had been observed, the collision would have been avoided, the loss should be divided. *The Pegasus*, U. S. C. C., D. Conn. Jan. 7, 1884; 19 Fed. Rep. 46.

2. ADMIRALTY—DEATH BY WRONGFUL ACT.

A State statute giving a remedy for death by wrongful act, can not afford the representative of a person killed by a marine tort, to libel the vessel *in rem*. A State can not endow with a maritime right one who is not entitled to that right by the law maritime. *The Manhassett*, U. S. D. C., E. D. Va. Jan. 1884; 18 Fed. Rep. 918.

3. AGENCY — AUTHORITY TO COLLECT INCLUDES WHAT.

Authority to collect a debt given to an agent, includes authority to employ counsel and bring suit. *Ryan v. Tudor*, S. C. Kan., Feb. 17, 1884.

4. AGENCY—FOREIGN UNDISCLOSED PRINCIPAL—LIEN FOR DEBT DUE FROM AGENT.
One who deals with an agent of a known foreign principal, can have no lien on funds belonging to the latter for a debt due from the agent, although he did not know who the principal was. *Mildred v. Maspons*, Eng. H. L., 49 L. T., N. S., 685.

5. ASSUMPSIT—DISTIBUTIVE SHARE IN ESTATE.
An action of *assumpsit* cannot be maintained against an administrator for the recovery of a distributive share in an estate, there having been no decree made by the probate court, although the defendant had filed his final accounts therein. *Cathaway v.* Bowles, S. J. C. Mass., 7 Mass. L. Rep., Feb. 7, 1884; *Contra, Segelken v. Meyer*, N. Y. Ct. App. 25 N. Y. Reg. 285.

6. BANKRUPTCY — CONFESSION OF JUDGMENT — PREFERENCE.
A warrant of attorney to confess judgment speaks from the time it is given, and not from the time it is exercised. Accordingly, the entering of judgment in pursuance of such a power, within two months before the filing of a creditor's petition, is not an act of the bankrupt, within that provision of the Bankrupt Act, making the preference voidable by the assignee, when made within two months. *Balfour v. Wheeler*, U. S. C. C., S. D. N. Y., Jan. 4, 1884; 18 Fed. Rep. 893.

7. CHINESE—RIGHTS OF.
Chinese laborers who left this country before the Chinese Restriction Act went into operation, but not after, and Chinese children whose parents lawfully reside in this country, are entitled to return or come to this country. *In re Tung Yeong*, U. S. D. C., D. Cal., Feb. 1, 1884; 1 W. C. Rep. 647.

8. COMMON CARRIER—DUTY TO SLEEPING PASSENGER—AUTHORITY OF CONDUCTOR.
A conductor has no authority to bind a railroad company by a promise to arouse a sleeping passenger at his station, so as to make the company liable for his neglect so to do. The passenger sleeps at his peril. *Munn v. Georgia, etc. R. Co.* S. C. Ga., Feb. 2, 1884.

9. CONTRACT — INFANCY — PURCHASE OF GOODS — EXTENT OF LIABILITY.
An infant who purchases goods not necessaries on credit, and does not return them, is liable for so much of the price as is equal to the benefit derived by him from the purchase, the amount of which is to be found by the tribunal trying the facts. *Hall v. Butterfield*, S. C. N. H., Reporter's Advance Sheets.

10. CONTRACT — SUNDAY — ENTIRETY — QUANTUM MERUIT.
An action can not be maintained to recover compensation for labor and services, not of necessity or mercy, performed on Saturday, Sunday, and Monday, under an entire contract made in contemplation of part performance on Sunday. *Williams v. Hastings*, S. C. N. H., Reporter's Advance Sheets.

11. CONSTITUTIONAL LAW—PROHIBITION BY STATE OF MISCEGENATIC MARRIAGES.
A statute which prohibits a white person from marrying one who has more than one-eighth part of negro blood, does not infringe the Fourteenth Amendment. *State v. Jackson*, S. C. Mo., Jan. 1884.

12. COPYRIGHT—WHAT IS VIOLATION.
A key for the use of teachers to a copyrighted school book, in which are transcribed substantial portions of the original work, is an infringement of the copyright. *Reed v. Holliday*, U. S. C. C., W. D. Pa., Jan. 31, 1884; 14 Pitts. L. J. 279.

13. CRIMINAL LAW — DRUGGIST SELLING LIQUOR DRUNK ON PREMISES.
A druggist is not liable for selling liquor drunk on his premises, if he forbade the purchaser to so drink it, if he sold it in good faith for medicinal purposes. *State v. McAdoo*, S. C. Mo., Feb. 1884.

14. CRIMINAL LAW — SENDING LOTTERY MATTER THROUGH MAILS—DECOY LETTERS.
The offense of sending letters or circulars concerning lotteries through the mails is complete under section 3894 of the Revised Statutes, although the circulars in question are sent in reply to letters written by a detective, under a fictitious name, for no other purpose than to obtain evidence of the commission of the offense. *United States v. Moore*, U. S. D. C., N. D. Ill., 19 Fed. Rep., 39.

15. CRIMINAL LAW—USING MAIL FOR FRAUDULENT PURPOSES.
A person is guilty of "placing a letter in the post office" if a letter has been so deposited by his direction by the hand of another. *United States v. Flemming*, U. S. D. C., N. D. Ill., 18 Fed. Rep., 907.

16. CRIMINAL PLEADING—INDICTMENT—DUPLICITY.
An indictment under sec. 5484 of Rev. Stats., which charges the defendant with having received money "under a threat of informing and as a consideration, for not informing against a party for violation of the revenue laws," is not objectionable for duplicity. *United States v. Todd*, U. S. C. C., E. D. Wis., 18 Fed. Rep., 901.

17. DEFENCES—TO CONTRACT—LAPSE OF TIME.
After a lapse of twenty years payment will be presumed of a promissory note. And evidence of the pecuniary necessities of the holder of the claim is competent to support the presumption. *Bean v. Tonnell*, N. Y. Ct. App., Jan. 15, 1884, 17 Rep., 214.

18. EMINENT DOMAIN — VALUE — MATTER FOR EXPERTS—INSTRUCTIONS.
1. An instruction to the jury that they might assess the compensation for land taken, according to their own knowledge, judgment and good sense, aided by their view of the land, without regard to the testimony, is erroneous. 2. The value of the rear end of a lot, the front part of which has been taken, may be shown to affect the value of the latter part. *Washbrun v. Milwaukee R. Co.*; *Barker v. Same*; *Stringham v. Same*, S. C. Wis., Jan. 29, 1884; 6 Wis. L. N. No. 118.

19. EQUITY — INJUNCTION — ENFORCEMENT OF A VOID CITY ORDINANCE.
Equity has no power to restrain a municipal corporation from enforcing a void ordinance; the remedy at law is adequate and complete. *Torpedo Co. v. Borough of Clarendon*, U. S. C. C., W. D. Pa., Jan. 21, 1884; 14 Pitts. L. J., 271.

20. ESTOPPEL—CONDUCT—FRAUD.
The owner of two lots who has mortgaged only one of them, but who attends a sale under the mortgage, hears the advertisement read of both lots, says nothing while the complainant is bidding for

what he supposed embraced both lots, is not estopped by such conduct, to resist the purchaser's claim to both. *Lupton v. Berner*, Md. Ct. App., 11 Md. L. Rec., Feb. 16, 1884.

21. EVIDENCE—ADULTERY—CONFESSION OF WIFE.
A confession of adultery written by the wife in the presence of and under the eye of the husband, is presumed to be procured by his coercion, and is not a safe basis upon which to build up and support a charge of adultery. *Summerbell v. Summerbell*, S. C. N. J., Nov. Term, 1883.

22. EVIDENCE—CHARACTER TO REBUT CHARGE OF FRAUD.
In an action on a policy of insurance where the defendant's evidence tended to show that the plaintiff burned his own building, and that he had committed perjury in his proof of loss, evidence of the plaintiff's good character was admissible. *Mosley v. Vermont Mut. Fire Ins. Co.*, S. C. Vt., 13 Ins. L. J. 97.

23. EVIDENCE—CREDIBILITY OF INFORMERS.
In a prosecution for violation of the liquor law, the defendant is not entitled to an instruction that the testimony of paid informers "is to be received with great caution and distrust," provided the judge is willing to and does charge the jury that they "are to take that fact into consideration in weighing their testimony." *Commonwealth v. Mason*, S. J. C. Mass., 7 Mass. L. Rep., Feb. 14, 1884.

24. EVIDENCE—DECLARATIONS OF TESTATOR INADMISSIBLE.
The prior declarations of a testator can not be proved of an intention to dispose of his property different from that expressed in the will, for the purpose of allowing an inference of undue influence or unsound mind. *Caldwell v. Anderson*, S. C. Pa. Jan. 7. 1884; 14 Pitts. L. J. 275.

25. FEDERAL COURTS—CITIZENSHIP—COUNTY WARRANT.
A citizen of another State, who purchases a county warrant payable to bearer, from a citizen of the State in which the county lies, may bring his action against the county in the Federal courts. *Wilder v. State*, U. S. C. C. D. Cal. Jan. 2, 1884; 1 West C. Rep. 540.

26. FOREIGN JUDGMENT—PROBATE OF WILL IN FOREIGN STATE—ADMISSIBITY OF CERTIFICATE.
The probate of a will in another State is a judicial proceeding, and under the Federal Revised Statutes must be received, if properly authenticated, as evidence to show the respective rights of the parties in a suit for partition. *Keith v. Keith*, S. C. Mo. Feb. 1884.

27. GAS COMPANY—PUBLIC CORPORATION—CONDITION—DEPOSIT.
A gas company is a public corporation and is bound to furnish every citizen in those localities where its pipes extend with gas, but it may require a deposit, before acting upon applications. *Williams v. Mut. Gas Co.*, S. C. Mich. Jan. 30, 1884; 18 N. W. Rep. 236.

28. GARNISHMENT—JOINDER OF SEPARATE GARNISHEES IMPROPER.
Two or more parties can not be held as garnishees unless the liability to the principal debtor is joint, and this is so whether the proceedings relate to the possession of the property or the indebtedness. *Young v. Ball*, S. C. Mich. Jan. 30, 1884, 18 N. W. Rep. 125.

29. GARNISHMENT—WAIVER.
A waiver "of any and all claim of homestead and exemption under the laws," etc., is not a waiver of exemption from garnishment. If such a waiver be intended it should be explicitly stated. *Smith v. Johnson*, S. C. Ga. Feb. 9, 1884.

30. HABEAS CORPUS—CAPITAL OFFENSE—PRESUMPTION OF GUILT—INDICTMENT.
The fact that a grand jury has found a bill for a capital offense is of itself a sufficient presumption of guilt such as to preclude any inquiry into the merits of the prisoner's case upon *habeas corpus*. *State v. Brewster*, S. C. La. 17 Rep. 207.

31. HABEAS CORPUS—CHINAMAN'S RIGHTS.
A Chinaman detained on board ship, and refused the right to land, by the authority of the master or collector of the port, may sue out *habeas corpus* in the Federal courts, but the ship can not be detained during the investigation. *Chow Goo Pooi's Case*, U. S. C. C. D. Cal. Jan. 26, 1884, 1 West, C. Rep. 535.

32. INDICTMENT—MURDER—DUPLICITY.
An indictment for murder may, in a single count, and without duplicity, charge the killing of one or more persons by the same act. *Chivania v. State*, Tex. Ct. App. Jan. 23, 1884, 13 Tex. L. Rev. 56.

33. INFANCY—DISAFFIRMANCE OF CONTRACT.
A minor who executes a conveyance of real estate must disaffirm it within a reasonable time after he comes of age, or be barred of his right to do so, such time to be determined by the court. Three years and one-half held unreasonable *Goodnow v. Empire Lumber Co.*, S. C. Minn. Jan. 28, 1884, 18 N. W. Rep. 283.

34. INSURANCE—FIRE—INSURABLE INTEREST—HUSBAND.
A husband has an insurable interest in the real estate of his wife, in which he enjoys an inchoate right of curtesy. *Barracliff v. Ins. Co.*, S. C. N. J. Nov. Term, 1883, 7 N. J. L. J. 40.

35. INSURANCE—LIFE—CREDITOR—LIMITATIONS.
Where a policy of life insurance is made payable to a creditor of the insured, the company cannot raise the question whether the debt of the insured was within the statute of frauds or barred by the statute of limitations. *N. W. Mut. L. Ins. Co. v. Heimann*, S. C. Ind. Feb. 14, 1884.

36. JURY TRIAL—RIGHTS OF CHINAMEN.
A Chinaman alleged to be unlawfully in the United States, against the provisions of sec. 12 of the Chinese exclusion act is not entitled to trial by jury. *Chow Goo Poi's case*, U. S. C. C. D. Cal. Jan. 26, 1884, 1 West C. Rep. 535.

37. CRIMINAL EVIDENCE—LARCENY—RECENT POSSESSION—PRESUMPTION -BURDEN.
Proof of exclusive and unexplained possession of property soon after the theft thereof, not only makes out a *prima facie* case for the government, but throws the burden of proof upon the accused *Territory v. Castle*, S. C. Ariz., Jan., 1884, 1 West C. Rep. 656.

38. MARRIAGE—HOW CONSITUTED—PROOF.
An actual ceremony of marriage is not essential to the establishment of the relation of husband and wife; it is sufficient that the parties, no impediments existing, consent to take each other as husband and wife and cohabit together as such.

And a finding that a man and woman lived together for 20 years and had 13 children is equivlent to a finding of the fact of marriage. *Peet v. Peet*, S. C. Mich. Jan. 28, 1884; 18 N. W. Rep. 220.

37. RAILROAD—DEFECTIVE TRACK.
A railroad company built and used a permanent spur track, placed partly upon trestle work, and which, by reason of its defective construction, fell with a ballast train upon it, and injured a brakeman employed on the train. *Held*, that the company was liable, although it employed competent persons and furnished suitable materials for such spur track, and although the train escaped from proper control by neglect of a fellow servant of the brakeman. *Elmer v. Locke*, S. J. C. Mass. 17 Rep. 209.

40. MECHANICS LIEN — MATERIAL — PRESUMPTION —EVIDENCE.
The presumption of law is that one furnishing materials to a contractor does so upon the credit of the building, and neither the charging of the bill to the contractor, nor the acceptance of his note, can overcome the presumption. The *onus* is upon the defendant to show that they were furnished upon the credit of the contractor solely. *Hommel v. Lewis*, S. C. Pa., Jan. 7, 1884, 14 Pitts. L. J., 265.

41. MORTGAGE—VOID AS AGAINST CREDITORS OTHERWISE VALID.
A mortgage given to hinder and defraud the creditors of the mortgagor, although void as to them, is so far valid between the parties that the mortgagee may demand foreclosure in equity, and the mortgagor can not raise the defense of fraud. *Bonestill v. Sullivan*, S. C. Pa.

42. NEGLIGENCE—INTERVENING ACT OF THIRD PARTY.
A person who leaves an uncovered barrel of brine on the sidewalk of a highway, is liable to the owner of a cow which died from drinking it, although the cow drank it from the ground whereon it had been spilt by a stranger. *Henry v. Davis*, S. C. Ind. S. C. Ind. Feb. 13, 1884.

43. PRACTICE—CONTINUANCE—ADMITTING TESTIMONY OF ABSENT WITNESS—EFFECT OF.
Admitting the testimony of an absent witness in order to avoid a continuance is not an admission of the truth of such testimony, nor does such admission preclude the party admitting it from rebutting the same on the trial. *Alden v. Carpenter*, S. C. Cal. Dec. 14, 1883, 1 W. C. Rep. 598.

44. PUBLIC OFFICERS—LIABILITY OF JUDGE FOR WRONGFUL ISSUE OF ATTACHMENT.
A justice of the peace is not liable for wrongfully issuing an attachment, although the note sued on upon its face showed that it was not due, but the plaintiff in his affidavit stated it was due. *Connelly v. Woods*, S. C. Kan. Feb. 17, 1884.

45. RELEASE—MORTGAGE—GIFT—WANT OF DELIVERY—LEGACY.
The execution by a father of a release of a mortgage given to him by his daughter, which release he placed in his safe, and after which he made his will, giving her a legacy larger than the indebtedness, can be given no effect, there being no evidence as to his intentions. The debt will be deducted from the legacy and the balance ordered paid to her. *Bomen v. Schnett*, S. C. Wis. Jan. 8, 1884. 18 N. W. Rep. 260.

46. RES JUDICATA—IMPEACHMENT OF JUDGMENT OF FOREIGN CIRCUIT COURT.
In a suit in a United States circuit court on a judgment in a court of another circuit a plea that the judgment was obtained by fraud, and covin on the part of the plaintiff is not a good defense. *Allison v. Chapman*, U. S. C. C. D. N. J., 7 N. J. L. J. 55.

47. SPECIFIC PERFORMANCE—OBTAINABLE NOTWITHSTANDING PENALTY.
Equity will decree the specific enforcement of a written agreement for the sale of land, in the absence of fraud, undue influence, or want of actual consideration, notwithstanding such agreement provides for the payment of a penalty upon the breach of the condition thereof. *Borel v. Mead*, S. C. N. Mex. Jan. 1884, 1 W. C. Rep. 614.

48. STATUTORY CONSTRUCTION "NOTICE IN WRITING."
A notice "in writing" required by a statute may be printed or engraved. *Peltoni v. Ottawa*, S. C. Mich. Jan. 30, 1884, 18 N. W. Rep. 245.

49. SUNDAY—ACT TO BE DONE ON FOLLOWING DAY.
When a statute gives a definite number of days for doing an act, and says nothing about Sunday, the days are consecutive, and include Sunday. And when the day on which the act is to be done falls on Sunday, the act must be done on the next day. *Cressey v. Parks*, S. J. C. Me. 29 Alb. L. J. 134.

50. SUNDAY—CONTRACT—ENTIRETY.
A contract which by its terms must be performed in part on Sunday made in Michigan to run a boat from one point to another in that State is void, though the boat in making the trip must pass through Canadian waters. *Gauthier v. Cole*, U. S. C. C. E. D. Mich. 29 Alb. L. J. 135.

51. SURETYSHIP—RIGHTS OF SURETY.
A surety on one of several notes secured by the same mortgage on real estate, after a foreclosure of the same, can not compel the judgment creditor or his assignee to apply the proceeds arising from the sale of the mortgaged premises *pro rata* towards the payment of such notes. *Wilson v. Allen*, S. C. Oreg. Jan. 1884, 1 W. C. Rep. 687.

52. SURVIVING PARTNER—ASSIGNMENT WITH PREFERENCES.
A surviving partner of an insolvent firm has no power to assign the firm assets with preferences. Such an assignment is void, and may be attacked directly in a court of law, as void. *Salsbury v. Ellison*, S. C. Colo. Jan. 25, 1884; 1 Colo. Dec. 76.

53. WILL—CONSTRUCTION.
Bequest to "all my living heirs an equal share, that is, share and share alike, that is, to my daughter, Eliza A. Crombie and children; Rachel J. McKee and her children; Mary Ann Craig's two children equal shares." *Held*, that Mrs. Crombie and Mrs. McKee took in exclusion to their children. *McKee's Appeal; In re Henry's Estate*, S. C. Pa., Jan. 7, 1884, 14 Pitts. L. J., 273.

54. WILL—CONSTRUCTION—"HEIRS."
The word "heirs" in a will must be given its common law signification, unless the will itself shows a contrary intention, and does not embrace those who take under the statute of descents and distribution. *Wilkins v. Ordway*, S. C. N. H., Reporter's Advance Sheets.

55. WILL—UNDUE INFLUENCE—BURDEN OF PROOF.
Where a stranger receives a large bequest, and he wrote or caused the will to be written for the tes-

tator who was of weak mind, the law casts the burden upon him of showing the absence of improper influence; but the law is not so utterly illogical and unnatural as to regard with disfavor the presence of a brother with his aged and childless sister at the making of her will, though he act as scribe and became a legatee. *Caldwell v. Anderson*, S. C. Pa. Jan. 7, 1884, 14 Pitts. L. J. 275.

QUERIES AND ANSWERS.

*[*** The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. To save trouble for the reader each query will be repeated whenever an answer to it is printed. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.*

QUERIES.

A contracts with B to convey a certain tract of land upon payment of the purchase-money, and B enters into possession. A leaves the State immediately thereafter, leaving an infant child. A is never heard from for nineteen years. Meantime B conveys in fee to C, describing the land as the same for which he, B, holds bonds for title. C enters immediately and holds possession about eight years; the period of limitation in this State being seven years, when a person holds by adverse, continuous possession under colorable title. Persons under disability of infancy must make claim within three years after disability is removed, or seven years after cause of action accrued. A's infant child, now a man more than three years past majority, only learns of C's adverse claim within one year, or a little over. Query? When does C's adverse claim put the statute of limitations in motion against A's heir, from his entry under his purchase from B, the vendee of A, or from the time that A's heir has actual notice of C's claim? It has been held in this State, North Carolina, that the vendee under an executory contract to convey land is a tenant at will of the vendor until the purchase money is paid. Query? Does the privity between the vendor and vendee under such executory contract, the purchase money being unpaid, extend to the alienee of the vendee so as to estop him from setting up title in himself by adverse possession under color of title?

Marion, N. C. LEX LOCI.

QUERIES ANSWERED.

Query 6. [18 Cent. L. J. 119.] A desiring to sell B lot 3 shows him lot 10. B purchases and takes his deed for lot 3—paying therefore $600 supposing he is getting lot 10. The actual market value of lot 10 at time of purchase was $400; of lot 3 was $100. When B discovered the deceit he tendered A a deed of lot 3 and demanded repayment of $600.—A refuses to return the money.—In an action by B against A for deceit, what is the measure of damages, leaving out the question punitive damages? Is it the difference between the market value of the two lots, *to-wit*, $300, or is it the difference between the value of lot 3 and purchase money paid, $300. Cite authorities. M.

Answer No. 1. Neither. The measure of damages is $600, and the interest thereon from the time the money was paid by B to A. The question of punitive damages could not arise. It appears from the statement of the case: "A desiring to sell B lot 3, etc.," that he believed he was showing lot 3 when he showed lot 10, but that is no defense. 3 Sutherland on Damages 587, and cases there cited. The plaintiff must recover back what he has paid. Warren v. Cole, 15 Mich. 265, Atlanta, etc. R. R. Co. v. Hodnett, 29 Ga. 461.

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Answer No. 2. Where one having agreed to convey ac ertain tract of land, fraudulently conveys one of less value, the measure of damages, in an action for the fraud, is the difference in value between the two, Hahn v. Cummings, 3 Iowa, 583; cited in 13 Iowa, 40; *vide* also 3 Sutherland on Damages 589, *et seq.* The measure of damages in the case stated would be the difference between the market value of the two lots, viz: $300. If the contract is intended to be rescinded, the measure of damages will be different.

Denver, Colo. JAS. H. BROWN.

Answer No. 3. In our opinion, conceived without examination of the authorities, but based upon the fundamental principles underlying the law of contracts, with respect to their rescission for fraudulent conduct, both of the above replies are incorrect. One can not resolve to retain the avails of a transaction into which he has been fraudulently drawn; he must place the fraudulent party in *statu quo*, or remain where he is. He can not retain what he receives and demand back the excess. He must tender back whatever he has received, demand what he has bargained for, and upon refusal, sue for what he has parted with. In this case he must tender back the deed of lot 3, demand a deed of lot 10, and bring his action upon refusal, for $600, money had and received to his use. It is possible we are wrong, but our opinion seems reasonable.—[ED. CENT. L. J.]

RECENT LEGAL LITERATURE.

MAXWELL'S PLEADING AND PRACTICE. A Treatise on Pleading and Practice, under the Code of Civil Proceedure with appropriate forms; together with the law and forms of proceedure relating to Appeals to the District Court, Appeals to the Supreme Court, Arrest and Bail, Attachment, Bills of Exceptions Costs, and Security for Costs, Divorce and Alimony, Dower, Evidence and the Mode of Procuring it, Executions, Proceedings in aid of Executions, Exemptions and Homestead, Habeas Corpus, Injunction Mandamus, Marshalling Assets, Quo-warranto, Proceedure in the District Court to vacate or modify its own judgments, Proceedings in error in the District Court, Proceedure in the Supreme Court, Probibition, Removal of Causes to the Circuit Court of the United States, Referees, Replevin, etc. By Samuel Maxwell, one of the judges of the Supreme Court of Nebraska, Third Edition, Revised and Enlarged. Lincoln, 1883. Neb. Journal Company.

We have heretofore reviewed the first edition of this work. 11 Cent. L. J. 519. The author has stated all there is in the book, in the title page. It is specially adapted to practice in the code States, but there is a great deal in it of value to the practitioner everywhere. There is an im-

mense amount of law, stated in the most concise manner, although there is a lack of elegance about its style. There are a great many forms interspersed with the text, but the appearance of the book would have been improved, if they had been reserved for an appendix. The same might be said of the citations which appear in the body of the work. The work has been enlarg d. The arrangement is methodical; but the manner in which the index is printed is objectionable. The learned author has done his work well; but it seems to us that the publishers have not been alive to the progress made in ideas of law book publishing.

FITNAM'S CODE SUMMONS. A practical treatise on the Code Summons and the Mode of Serving it, as prescribed by Civil Codes of Colorado, Wyoming, Kansas, Nevada, Nebraska and other States, with copious and accurate forms for the use of attorneys, clerks of courts and sheriffs, in preparing and serving the same. By John C. Fitnam, of the Colorado Bar. Denver: 1883. Denver Law Journal.

This book covers a part of the same ground, only more fully, as that just reviewed. Some of the objections interposed to that book may apply to the work before us. The whole subject is elaborately, and lucidly discussed. The typographical work is excellent.

AMERICAN REPORTS. The American Reports, Containing all Decisions of General Interest Decided in the Courts of Last Resort of the Several States, with Notes and References. By Irving Browne. Vol 44. Albany, 1883; John D. Parsons, Jr.

This volume, which includes cases decided from December, 1880, down to a late day in 1883, is full of interesting law. We observe that in Louisiana, insanity must be proved by the defence beyond a reasonable doubt, State v. Rance, 34 La. Ann. 186; that in South Carolina, a superintendent is reduced to the level of a fellow-servant; Gunther v. Manufacturing Co., 18 S. C. 262; that the mere sending a letter through the mail, does not found a civil action for libel; Sparks v. Poundstone, 87 Ind. 522; Thoroughgood v. Bryan is *thoroughly* repudiated in Illinois, Wabash, etc. R. Co. v. Shacklett, 105 Ill. 364. Taxpayers need not fear that their money will be paid to those who lose their property by the negligence of the fire department, Robinson v. Evansville, 87 Ind. 334, or to repair limbs broken by coasting boys, Faulker v. Aurora, 85 Ind. 130. Indiana holds that an action for mere institution of a civil suit maliciously, will lie, McArdle v. McQuinley, 86 Ind. 538. It is no defence to a judgment *de retornendo* in replevin that the property has been destroyed by act of God; Ayers v. Burns, 87 Ind. 245. Connecticut has placed herself in the list of States denying the right of a mortgagee to sue *at law* a grantee assuming the mortgage, Meech v. Ensign, 49 Conn 191. The editor continues to do his work "up brown;" and it is useless for a practitioner to attempt to conduct his practice successfully without having this series at his side.

NOTES.

—Curious comments by a judge, even in the presence of a prisoner, though extremely rare, are not unprecedented. Mr. Justice Maule once addressed a phenomenon of innocence in a smock frock in the following words: "Prisoner at the bar, your counsel thinks you innocent; the counsel for the prosecution thinks you innocent; I think you innocent. But a jury of your own countrymen, in the exercise of such common sense as they possess, which does not seem to be much, have found you 'guilty,' and it remains that I should pass upon you the sentence of the law. That sentence is that you be kept in imprisonment for one day, and, as that day was yesterday, you may now go about your business." The unfortunate rustic, rather scared, went about his business, but thought that law was an uncommonly puzzling business.

—The *Galveston News* says: "There are now 145 lawyers in jail in New York State. This is a fine record, and the legal profession is liable to become respectable one of these days. There are only seven newspaper men in jail in the same State." We regret to learn that the newspaper men are more successful in evading the law than lawyers. They (excluding law journalists, of course), certainly violate it as often. It is possible, however, that the 145 lawyers referred to had some connection with newspapers, and thus got themselves into trouble.

—We learn from the *New York Register* that a bill has been proposed by the Medico Legal Society, of New York, to the Legislature of that State for the appointment of a commission of experts in each judicial department, having special qualifications on the subject of mental disease, and to confine litigants who desire mental experts as witnesses to selections from the list of experts thus appointed; "and no other mental experts shall be examined upon such trial." This movement, if well founded, and we are of firm opinion that it is, should take root in every State. The *Register* however, subjects the measure to one well deserved criticism, which is that the bill shuts out any competent attending physician from testifying, unless he happens to be on the list. He is certainly the best witness obtainable, and his testimony should by no means be lost. This was evidently an oversight, and can be easily remedied. Now that the ball has commenced rolling, it may well be kept in motion.

—There is a case in the 93d volume of the New York Reports, which, according to the *Daily Register*, is important to attorneys. Tenney v. Berger, p. 524, decides that "an attorney retained generally to conduct a legal proceeding enters into an entire contract to conduct the proceeding to its termination; and if before such termination he abandon the service of his client without justifiable cause or reasonable notice, he can not recover for the services he has rendered. The employment, however, by the client, without the consent of or consultation with the attorney, of a counsel with whom the attorney's relations are such that they can not cordially co-operate, is a justifiable cause for his withdrawal from the case, and upon such withdrawal the client is liable for services rendered."